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No. 09-992

IN THE
Supreme Court of the United States

IBRAHIM PARLAK,
Petitioner,

v.

ERIC H. HOLDER, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The National Immigrant Justice Center ("NIJC") is a nationally recognized non-governmental organization dedicated to ensuring human-rights protections and access to justice for all immigrants, refugees, and asylum seekers.[1] By partnering with more than 1,000 pro bono attorneys, NIJC provides direct legal services to approximately 10,000 individuals annually. This experience informs NIJC's policy, litigation, and educational initiatives, as it promotes human-rights on a local, regional, national, and international level. NIJC has a substantial interest in the issue before the Court, both as an advocate for the rights of refugees and asylum seekers generally and as the leader of a network of attorneys who regularly represent refugees and asylum seekers in legal proceedings.

SUMMARY OF ARGUMENT

The Board of Immigration Appeals ("BIA") found that Petitioner was ineligible for asylum based on the BIA's interpretation of the persecutor bar, which states that an alien who "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion" is ineligible for withholding from removal on

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[1] Counsel of record for all parties received timely notice of the NIJC's intention to file this brief and consented to its filing. No party, counsel for a party, or person other than the NIJC, its members, or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission.

asylum grounds. Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq.* ("INA"), 8 U.S.C. § 1101(a)(42)(B); 8 U.S.C. § 1158(b)(2)(A); 8 U.S.C. § 1231(b)(3)(B)(i). Relying on previous BIA decisions that interpreted the persecutor bar under the INA as controlled by this Court's decision in *Fedorenko v. United States*, 449 U.S. 490 (1981),[2] the BIA interpreted "assisted ... in the persecution" as extending to any person who "furthers the persecution [of others] *in some way*." Pet. App. at 70a (emphasis added).

The Sixth Circuit disagreed with this interpretation, finding it "vague and unhelpful," and noted that "the issue is not whether the person

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[2] In *Fedorenko*, this Court considered whether a U.S. citizen who had served as a Nazi concentration camp guard, albeit allegedly as a prisoner of war, but who did not disclose that fact in his visa application under the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (the "DPA"), could have his citizenship revoked under the INA, 8 U.S.C. § 1451(a) (requiring revocation of citizenship "illegally procured or ... procured by a concealment of a material fact or by willful misrepresentation"). 449 U.S. at 493. The Court held that Fedorenko's failure to disclose his service as a Nazi concentration camp guard was a misrepresentation of a material fact because the DPA did not contain a "voluntariness" exception to its persecutor bar, *id.* at 512, and because the evidence left "no room for doubt" that Fedorenko "would have been found ineligible for a visa" under the DPA had he disclosed that he had served in that capacity. *Id.* at 513. The Court noted, however, that under different facts, there might be more "difficult line-drawing problems" as to whether a person's conduct constituted "persecution" under the DPA. *Id.* at 513 n.34.

assists in *some* way." Pet. App. 21a. Rather than reversing and remanding, however, the Sixth Circuit took it upon itself to apply its own construction of the persecutor-bar "assistance" language to the underlying record. As Petitioner argues, this was error under *INS v. Orlando Ventura*, 537 U.S. 12 (2002), and *Gonzalez v. Thomas*, 547 U.S. 183 (2006).

The Court should grant the petition for a writ of certiorari and summarily reverse the Sixth Circuit decision for two additional reasons:

First, summary reversal is warranted because the Sixth Circuit should have remanded the case to the BIA pursuant to *Negusie v. Holder*, 129 S. Ct. 1159 (2009). In *Negusie*, this Court rejected a construction of the persecutor bar standard relied upon by the BIA as based upon a "mistaken legal premise." *Id.* at 1163. The BIA in this case relied upon the same flawed standard rejected in *Negusie*. Further, just as in *Negusie*, the BIA here has not had the opportunity, in the first instance, to apply an appropriate interpretation of the persecutor bar to the facts of Petitioner's case.

Second, the Sixth Circuit for the first time applied to the asylum context a wholly inapplicable doctrine drawn from the prohibition of material support for designated terrorist groups under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214. Under the Sixth Circuit's "money is fungible" test, any amount of monetary assistance provided by an asylum applicant that could be channeled to a group that persecutes others could meet the persecutor bar "assistance" standard. Leaving aside the

questionable wisdom of applying such a broad doctrine to the asylum context, such a policy decision is, at least in the first instance, within the province of the Executive Branch, not the courts.

ARGUMENT

I. Summary Reversal Is Warranted Because The Sixth Circuit Should Have Remanded The Case To The BIA After The BIA Applied An Interpretation Of The Persecutor Bar Rejected By This Court In *Negusie*.

"The statute that bars persecutors has a smooth surface beneath which lies a series of rocks. Among the problems are the nature of the acts and motivations that comprise persecution, the role of scienter, whether and when inaction may suffice, and the kind of connection with persecution by others that constitutes 'assistance.'" *Castaneda-Castillo v. Gonzalez*, 488 F.3d 17, 20 (1st Cir. 2007) (*en banc*).

This Court should summarily reverse the Sixth Circuit for failing to remand Petitioner's case to the BIA in light of this Court's decision in *Negusie*. *See Parlak*, 578 F.3d at 469, Pet. App. at 20a. The error here is virtually the same as in *Negusie*: the BIA erroneously applied *Fedorenko*'s "objective effects" test to the statutory phrase "assisted ... in the persecution" of others, and thus ignored the complexities of the persecutor bar, such as Petitioner's motivation, intent and *scienter*.

In *Negusie*, this Court held that the BIA's interpretation of the persecutor bar standard was flawed because the BIA had "misapplied our precedent in *Fedorenko* as mandating that an alien's

motivation and intent are irrelevant to the issue whether an alien assisted in persecution." 129 S. Ct. at 1163. The Court remanded to the BIA so that the BIA could "confront the same question free of this mistaken legal premise."[3] *Id.*

Here, the BIA stated, without analysis, that "[a] person assists in the persecution of others when he furthers the persecution in some way."[4] Pet. App. at 70a. As support, the BIA relied on *In re Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988), *abrogated by Negusie v. Holder*, 129 S. Ct. 1159 (2009). Pet. App. at 70a. In *Rodriguez-Majano*, the BIA interpreted the persecutor bar as concerning only the "objective effect" of an alien's conduct without regard to questions of volition, motivation or intent.[5] This is

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[3] The Sixth Circuit attempted to distinguish *Negusie* on the ground that "voluntariness [was] not at issue" in Petitioner's case. *See, e.g., Parlak*, 578 F.3d at 469, Pet. App. at 20a. In *Negusie*, however, voluntariness was merely one aspect of the broader mistaken premise relied upon by the BIA that, pursuant to *Fedorenko*, the persecutor bar required only a showing of an "objective effect" without regard to questions of volition, motivation or intent. 129 S. Ct. at 1163.

[4] The Sixth Circuit found the BIA's broad interpretation "vague and unhelpful" because "the issue is not whether a person assists in *some* way; rather the analysis requires distinguishing between 'genuine assistance in persecution and inconsequential association with persecutors.'" *Parlak*, 578 F.3d at 470, Pet. App. at 21a (citing *Singh v. Gonzalez*, 417 F.3d 736, 739 (7th Cir. 2005)). However, the Sixth Circuit nevertheless affirmed the BIA's decision and stated that "the BIA did not err in its legal analysis." *Parlak*, 578 F.3d at 470, Pet. App. at 23a.

[5] The BIA stated:

the same "objective effect" standard that this Court later rejected in *Negusie* because it was based on the "mistaken legal premise" that *Fedorenko* controlled in this context. *Negusie*, 129 S. Ct. at 1163.[6]

> The participation or assistance of an alien in persecution need not be of his own volition to bar him from relief. *See Fedorenko v. United States*, 449 U.S. 490 (1981). However, mere membership in an organization, even one which engages in persecution, is not sufficient to bar one from relief, but only if one's action or inaction furthers that persecution in some way. It is the objective effect of an alien's actions which is controlling. *Laipenieks v. INS*, 750 F. 2d 1427, 1435 (9th Cir. 1985); *Matter of Fedorenko*, Interim Decision 2963, at 17 (BIA 1984); *see Fedorenko v. United States*, *supra*, at 750 n.34.

Rodriguez-Majano, 19 I. & N. Dec at 814-15.

[6] The Immigration Judge in this case also relied upon *Rodriguez-Majano*'s "objective effect" standard:

> A person assists in the persecution of others when his or her action or inaction furthers the persecution in some way. *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 814 (BIA 1988). It is the objective effect of an alien's actions which is controlling. *Id.*, citing *Laipenieks v. INS*, 750 F.2d 1427, 1435 (9th Cir. 1985); *Matter of Fedorenko*, 19 I&N Dec. 57, 69 (BIA 1984), *see also Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981). Participation or assistance need not be on the alien's own volition *Matter of Rodriguez-Majano*, *supra* at 814, citing *Fedorenko v. United States*, *supra*. Personal involvement in the persecution is not necessary to impose responsibility for assisting or participating in persecution.

Pet. App. at 119a. The BIA upheld this analysis. Pet. App. at 72a-73a.

Moreover, in *Negusie*, this Court specifically criticized *Rodriguez-Majano* as "incorporat[ing] without additional analysis the *Fedorenko* rule" from previous decisions that were similarly flawed. 129 S. Ct. at 1167.

The BIA in this case applied the "objective effects" standard without making specific findings as to motivation, intent or *scienter*. The BIA merely concluded that Petitioner's conduct "amount[ed] to knowing assistance in fund-raising," Pet. App. at 72a, because he raised money for an organization known as the ERNK. Pet. App. at 60a. The Sixth Circuit found this to mean that Petitioner "voluntarily and knowingly provided money, which he knew could be used by the PKK for anything." *Parlak*, 578 F.3d at 470, Pet. App. at 22a. However, Petitioner testified that at the time he engaged in such fund-raising, "he had no knowledge that the PKK engaged in terrorist activity." Pet. App. at 94a. Indeed, the PKK was not designated as a "Foreign Terrorist Organization" under the INA until October 8, 1997, Pet. App. at 93a-94a (referring to 8 U.S.C. § 1189), which was six years after Petitioner had arrived in the United States, Pet. at 19.

The BIA made no findings as to whether Petitioner, at the time he was organizing Kurdish cultural festivals for the ERNK in Germany, knew about the persecutive activities of the PKK in Turkey, or how his fund-raising activities might be linked to specific persecutive activities of the PKK. Courts have held that one cannot "assist" in persecution under the persecutor bar if one does not know, at or before the time the assistance is

rendered, that persecution is occurring or will likely occur as a result of one's assistance. *See Diaz-Zanatta v. Holder*, 558 F.3d 450, 458 (6th Cir. 2009) (remanding where Immigration Judge "did not consider . . . whether Diaz-Zanatta had prior or contemporaneous knowledge of any such persecutions."); *Castaneda-Castillo*, 488 F.3d at 20 ("[A] bus driver who unwittingly ferries a killer to the site of a massacre can hardly be labeled a 'persecutor,' even if the objective effect of his actions was to aid the killer's secret plan."); *cf. Negusie*, 129 S. Ct. at 1170 (Scalia, J., concurring) (describing the "unknowing persecutor" problem under the "objective effects" standard, where the persecutor bar could "encompass even an alien who had no idea that his actions would 'objectively' assist in persecution"). Nor did the BIA determine that Petitioner's fund-raising activities were performed with any degree of motivation or specific intent to further the PKK's persecutory acts.

The failure of the Sixth Circuit to require that the BIA analyze issues of motivation, intent and *scienter* also stands in stark contrast to the weight of appellate court authority, which suggests that an inquiry into personal culpability is necessary for an application of the persecutor bar.[7] For example, in

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[7] Determining that an individual acted "'knowingly' does not necessarily have any reference to a culpable state of mind." *Bryan v. United States*, 524 U.S. 184, 192 (1998); *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 (1978) (noting a distinction between acting with knowledge of the action's likely effects and acting "with the 'conscious object' of producing such effect.")

Castaneda-Castillo, the *en banc* First Circuit considered the case of a former lieutenant in the Peruvian military who was part of an operation to hunt for members of the Shining Path in a village. 488 F.3d at 19. While Castaneda's patrol stood guard outside the village to block escape routes, another patrol engaged in a brutal massacre of dozens of innocent civilians. *Id.* Castaneda claimed not to have known about the massacre at the time. *Id.* The Immigration Judge found that regardless of Castaneda's state of mind, the "objective effect" of Castaneda's participation was to block the escape of the villagers being massacred. *Id.* at 20. The First Circuit reversed and remanded, finding that there was insufficient evidence to apply the persecutor bar to Castaneda. *Id.* The court noted that "the term 'persecution' strongly implies both scienter and illicit motivation," and that the "objective effect" test was insufficient insofar as it did not distinguish between "degree[s] of moral culpability." *Id.* at 20-22; *see also Hernandez v. Reno*, 258 F.3d 806, 813-14 (8th Cir. 2001) (vacating BIA application of the persecutor bar and remanding where the BIA failed adequately to consider the degree of personal culpability); *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004) ("[I]ndividual accountability must be established."); *cf. Xu Sheng Gao v. U.S. Attorney General*, 500 F.3d 93, 99 (2d Cir. 2007) (noting that persecutor bar should require more than conduct "tangential" and "passive in nature" with regard to oppressive acts).

The Sixth Circuit erred in failing to remand this case to the BIA following *Negusie* because the BIA

had not determined in the first instance whether *any* degree of moral culpability was required under the persecutor bar. The "in some way" test that the BIA relied on was developed on the basis of a mistaken application of *Fedorenko* and a flawed assumption that the inquiry under the statute is limited to the objective effects of an asylum applicant's actions.

Summary reversal is warranted here because, as in *Negusie*, the agency decision was flawed by a mistaken legal premise. The Sixth Circuit should have remanded the case to the BIA so that the agency could in the first instance consider issues of motivation, intent, and *scienter* divorced from the "objective effects" standard that this Court has already rejected.

II. Summary Reversal Is Warranted Because The Sixth Circuit Impermissibly Established A New And Radical Immigration Policy By Extending The "Fungibility of Money" Doctrine To The Standard For Withholding Of Removal.

This case also illustrates why federal courts should follow the "ordinary remand rule" instead of making immigration policy in the first instance, and why summary reversal of the Sixth Circuit's decision is both warranted and necessary. *See Ventura*, 537 U.S. at 16-17 (noting that the ordinary remand rule has "obvious importance in the immigration context.")

After rejecting the BIA's interpretation of the persecutor bar, the Sixth Circuit held that the BIA should have applied the test the Sixth Circuit had recently adopted in *Diaz-Zanatta*, an opinion

published after the BIA's decision. *Parlak*, 578 F.3d at 470, Pet. App. at 20a. *Diaz-Zanatta* held that there were "two distinct requirements" to the analysis of whether a person's conduct met the standard of "assistance" under the persecution bar: (1) whether there was "some nexus between the alien's actions and the persecution of others," and (2) "if such a nexus is shown, [whether] the alien ... acted with scienter." *Diaz-Zanatta*, 558 F.3d at 455. However, instead of remanding to the BIA, the Sixth Circuit improperly conducted a *de novo* review in an attempt to resuscitate the BIA's findings made under a flawed legal standard. *See Ventura*, 537 U.S. at 16 ("A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'") (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

To overcome the clear inadequacy of the record, the Sixth Circuit took the impermissible step of establishing immigration policy by importing a doctrine, "money is fungible," from a Ninth Circuit opinion construing the prohibition on material support for designated terrorist organizations under the AEDPA. *See Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000). Under that test, which has never been cited in any BIA rulemaking or decision in relation to the persecutor bar, "giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts." *Id.*

There are many reasons to question whether this is a sound or even permissible construction of the

persecutor bar in the asylum context. For example, if certain environmental advocacy campaigns are to be believed, any foreign owner of a gas-guzzling SUV might be disqualified from seeking asylum since the money spent on gasoline could theoretically end up supporting terrorist groups.[8]

This Court's decision in *Bridges v. Wixon*, 326 U.S. 135 (1945), is also instructive. The case involved whether a leading union organizer, Harry Bridges, could be deported under a statute that allowed the exclusion of aliens who "affiliated" with groups advocating the violent overthrow of the United States government, such as the Communist

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[8] *See* Americans for Fuel Efficient Cars, *The Detroit Project*, *available at* http://www detroitproject.com/ads/default.htm (last visited Mar. 24, 2010) A script for an ad called "George" reads:

> This is George. This is the gas that George bought for his SUV. This is the oil company executive that sold the gas that George bought for his SUV. These are the countries where the executive bought the oil that made the gas that George bought for his SUV. And these are the terrorists who get money from those countries every time George fills up his SUV.
>
> OIL MONEY SUPPORTS SOME TERRIBLE THINGS. WHAT KIND OF MIL[E]AGE DOES YOUR SUV GET?
>
> www.thedetroitproject.com
>
> Paid for by The Detroit Project

Party. *Id.* at 139-40. This Court reversed the deportation order, finding that Bridges had not "affiliated" with the Communist Party, despite his advocacy activities and position as a union leader. *Id.* at 147-49. This Court held:

> Common sense indicates that the term "affiliation" in this setting should be construed more narrowly. Individuals, like nations, may cooperate in a common cause over a period of months, even though their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of Communism. An individual who makes contributions to feed hungry men does not become "affiliated" with the Communist cause because those men are Communists.

Id. at 143. Although the context is obviously different, the Court's discussion of overly broad definitions of "affiliations" and the Court's example of individuals who provide food to hungry men illustrate the peril of exporting a "money is fungible" concept to asylum decisions. Absent a specific finding of congressional intent, it should not be presumed that any individual who donates money to or raises money for an organization necessarily intends to support acts of persecution those organizations may engage in, let alone the activities

of merely affiliated organizations. A "money is fungible" rule could obliterate all such distinctions.

There is no reason to believe that Congress intended the persecutor bar to cast such a wide net in the asylum context. As noted by the Second Circuit:

> In evaluating a persecutor bar claim, it must be remembered that this provision authorizes the deportation of individuals who have established that they would likely be persecuted if sent back to their native country. Thus, courts must be cautious before permitting generalities or attenuated links to constitute "assistance."

Xu Sheng Gao, 500 F.3d at 98. For this reason, "where the fate of a human being is at stake the presence of [an] evil purpose may not be left to conjecture" and it is impermissible to "impute belief" based on "[i]nference ... piled on inference." *Bridges*, 326 U.S. at 148, 149.

Here, as in *Negusie*, the Sixth Circuit improperly applied a test derived from "a different statute enacted for a different purpose." *See* 129 S. Ct. at 1166. Such a fundamental policy decision is, at least in the first instance, within the exclusive province of the Executive Branch, not the courts. "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). It

does not matter whether the Sixth Circuit's analysis is, in fact, the correct analysis: "For [the] purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Id.*

The Sixth Circuit's attempt to rewrite basic principles of asylum law illustrates why the "ordinary remand rule" is the accepted and usual course of judicial proceedings in the context of judicial review of administrative agency decisions. "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *Negusie*, 129 S. Ct. at 1164. Summary reversal is warranted because the Sixth Circuit so far overstepped its bounds.

CONCLUSION

For the foregoing reasons, the NIJC requests that this Court grant the Petitioner's petition for a writ of certiorari and summarily reverse the decision below.

Respectfully submitted,

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